(3)

No. 98-1288

In The

Supreme Court of the United States

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE PETITIONERS

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November 10, 1999

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QUESTION PRESENTED

Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the claimant does not allege membership in a class or group, but asserts that vindictiveness motivated the government to treat her differently than others similarly situated.

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The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 170-175) is reported at 160 F.3d 386. The opinion of the District Court for the Northern District of Illinois, Eastern Division, dated April 13, 1998, (J.A. 60-67) is not published, but can be found at 1998 WL 196455 (N.D.Ill.).

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on November 12, 1998. No Petition for Rehearing was filed. The Petition for Writ of Certiorari was filed on February 9, 1999, and was granted on September 28, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Respondent's Amended Complaint sought relief pursuant to §1983 for an alleged violation of the Equal Protection Clause and jurisdiction was conferred under 28 U.S.C. §1331 and §1334.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

Nature of the Case

Respondent is a resident of the Village of Willowbrook and Petitioners are the Village of Willowbrook, its President, Gary Pretzer, and its Director of Public Services, Philip J. Modaff. J.A. 4. Respondent brought this equal protection action to recover for damages sustained as a result of a delay in a construction project that connected the Village of Willowbrook's municipal water supply to her home. The Respondent has alleged that the delay occurred because Petitioners initially demanded, as a condition of extending water service, that Respondent grant to the Village a thirty-three-foot easement to improve the road adjacent to Respondent's property and along which the new water main would be installed. The Amended Complaint alleged that the delay was maliciously caused by the Petitioners in retaliation for Respondent's filing of a separate lawsuit against the Village.

The Respondent brought the cause of action pursuant to principles set forth by the Seventh Circuit Court of Appeals in the case of *Esmail v. Macrane*, 53 F.3d 176 (7th

Cir. 1995), alleging that Petitioners violated the Equal Protection Clause by singling her out as the object of their animosity. In *Esmail*, the plaintiff was denied a liquor license ostensibly due to his commission of minor infractions of the liquor code while others were granted licenses despite more severe infractions. The Seventh Circuit Court of Appeals held that the Equal Protection Clause provided a remedy despite the plaintiff's lack of membership in a vulnerable group, because "a powerful public official picked on a person out of sheer vindictiveness." 53 F.3d at 178. The court deemed the Equal Protection Clause applicable where a plaintiff could prove that "action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." *Id.* at 180.

Statement of Facts

The following facts are taken from the allegations of Respondent's Amended Complaint. The Respondent resided in the Village of Willowbrook along Tennessee Avenue which was a non-dedicated road. J.A. 4, 8-9. No easements had ever been granted to the Village of Willowbrook for the use of any portion of Tennessee Avenue. J.A. 8-9. In the spring of 1995, the Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue to be connected to the municipal water supply system by the spring of 1997. J.A. 7. Also in the spring of 1995, Respondent's well broke down and in May of 1995 she requested that the Village connect her home to the municipal water system "right away." J.A. 7, 8. Respondent used an over-ground hose to draw water

from a neighbor's well as a temporary solution. J.A. 7. In November of 1995 this hose froze, precluding Respondent from obtaining water. J.A. 12.

As part of the water extension project, the Village desired to dedicate Tennessee Avenue and improve it with pavement, sidewalks and public utilities. J.A. 9. In August and September of 1995, the Village Public Services Director, Philip J. Modaff, told Respondent that the Village would not proceed with the project unless it obtained thirty-three-foot easements from property owners who lived adjacent to Tennessee Avenue in the area where the water main would be installed. J.A. 9. The Respondent objected to providing a thirty-three-foot easement and in November of 1995, the Village agreed to require a fifteen-foot easement and a temporary construction easement of an additional five feet for the water extension project. J.A. 31. Respondent's Amended Complaint alleged that the request for a thirty-three-foot easement was not consistent with Village policy. J.A. 9-10. A letter drafted by the Village Attorney in November of 1995 included the following:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village. J.A. 10-11.[1]

The project was completed and water was delivered to Respondent's home in March of 1996, but Respondent

[1] The complete letter drafted by the Village Attorney is included in the Appendix to this brief. (App. 1-2)

was without water in her home from November of 1995 through March of 1996. J.A. 12.

The Respondent's Amended Complaint does not allege that any other Village residents who lived adjacent to non-dedicated unimproved roads were not asked for thirty-three-foot easements to improve the roads as a condition of the delivery of public water. Nor does the Amended Complaint allege that Tennessee Avenue was ultimately dedicated or improved as part of the water connection project.

The Amended Complaint alleged that Petitioners violated Respondent's equal protection rights by initially demanding the thirty-three-foot easement, an "irrational and wholly arbitrary" demand not made of others similarly situated. J.A. 10. It was further alleged that ill will generated by a separate lawsuit filed by Respondent in 1989 against the Village and Respondent's prior refusal to grant easements for a storm water drainage project favored by the Village, motivated Petitioners to treat Respondent differently. J.A. 5, 6, 10.

Course of Proceedings and Disposition Below

Respondent's original Complaint was withdrawn and Petitioners' Rule 12(b)(6) Motion to Dismiss the Amended Complaint was granted on April 13, 1998. Respondent filed a timely Notice of Appeal on May 13, 1998, and on November 12, 1998, the Seventh Circuit Court of Appeals issued its decision reversing the District Court and remanding the case to the District Court for further proceedings.

The Court of Appeals held that Respondent's allegations that Petitioners' demanded a thirty-three-foot easement while similarly-situated property owners had given fifteen-foot easements, and that Petitioners did so in retaliation for Respondent's prior lawsuit against and disagreements with the Village, were sufficient to state a cause of action for denial of equal protection. The court rested its decision on *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), which held that a government can violate the Equal Protection Clause by depriving a person of a benefit out of vindictiveness or ill will, despite the person's lack of membership in a "class."

Summary of Argument

The original intent of the Equal Protection Clause was to eliminate government discrimination against African-Americans. Even when the scope of the Equal Protection Clause was expanded by the courts, the focus remained on discrimination against classes or groups. The cases which extended its protection to non-class based discrimination were few in number. Although the decision in *Snowden v. Hughes*, 321 U.S. 1 (1944), has been cited as support for the expansion of the Clause to non-class based claims, *Snowden* actually stands for the proposition that a governmental action that maliciously singles out a person for denial of a benefit does not violate equal protection standards. This Court has continued to focus on class identification in equal protection cases. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring).

Allegations of vindictiveness should not sustain equal protection claims, because such motivations are easy to allege and impossible to discern. Federal courts would be handed the impossible task of searching for the motive behind decisions made by public officials which offend certain individuals. This search would entail examinations of all officials involved in the decision-making process regarding their relationship with the claimant and the bases for their decision. Discretionary acts, otherwise lawful, should not be challenged simply because of the alleged improper motive of the public official.

Class-of-one claimants do not need the safeguard of the Equal Protection Clause since adequate state and federal remedies exist. Mandamus and injunctive relief in the state courts, and substantive due process claims in the federal courts, will protect class-of-one claimants from arbitrary state action.

The class-of-one equal protection claim has created a constitutionally protected interest not to be the victim of vindictiveness with the focus on the mind-set of the official, rather than the nature of the deprivation. Such focus fails to set any definable parameters for the cause of action. Recognition of a class-of-one equal protection claim will open up federal courts to review all municipal discretionary acts which are allegedly motivated by vindictiveness. Public employers, prison officials and zoning and planning boards will all be answering federal lawsuits claiming that action they took was vindictively motivated.

If this Court recognizes a class-of-one equal protection claim, such a claim should be subject to a presumption that the municipal official's conduct was constitutional and should be defeated by proof that the decision was supported by any "conceivable rational basis."

ARGUMENT

The Legislative Intent of the Equal Protection Clause was Elimination of Class-Based Discrimination

The legislative history of the Fourteenth Amendment established a foundation for equal protection jurisprudence that focused on the elimination of arbitrary classifications. Sifting the debates in search of the intent of the Fourteenth Amendment yields a single recurring theme; the equality of the African-American race. Introducing the joint resolution in the Senate, Senator Howard stated:

> This abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield it throws over the white man. *Cong. Globe*, 39th Cong., 1st Sess., 2766 (May 23, 1866).

Senator Howe spoke of Section 1 of the Amendment as being aimed at the unequal Black Codes. *Cong. Globe*, 39th Cong., 1st Sess., App. 217-26 (June 5, 6, 1866). Congressman Boyer remarked that the Fourteenth Amendment was, "intended to secure, ultimately, and to some

extent indirectly, the political equality of the Negro race." *Cong. Globe*, 39th Cong. 1st Sess., 2465-67 (May 8, 1866). Opponents of the Amendment expressed the concern that equality between the races should not be ordered by Congress. *Cong. Globe*, 39th Cong., 1st Sess., 2530 (1866).

The framers of the Civil War Amendments intended to deny to the states the power to discriminate against persons on account of race, *Loving v. Virginia*, 388 U.S. 1 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Slaughter-House Cases*, 16 Wall. 36, 71-72 (1873), and thereby create "one class of citizenship." *Bell v. Maryland*, 378 U.S. 226, 252 (1964) (Douglas, J., concurring).

The Equal Protection Clause has, by design, had a narrow application, combatting officially sanctioned or reinforced discrimination against classes or groups because a caste system was deemed abhorrent to a Republican form of government. This Court has identified the ultimate goal of the Clause to be the elimination of all governmentally imposed discrimination based on race. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

In its earliest examination of the Clause, this Court explained that its true spirit and meaning could not be understood without keeping in view the history of the times when the Fourteenth Amendment was adopted and the general object it plainly sought to accomplish. *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1880). When the Fourteenth Amendment was incorporated into the Constitution, it was anticipated that state laws might be enacted or enforced to perpetuate racial distinctions that existed for centuries. *Id.* at 306-07. The *Strauder* Court

reasoned that absent the apprehension of prejudice, the Equal Protection Clause would have been unnecessary and it might have been left to the states to extend equality of protection. *Id.* at 306-07 (1880). One hundred years later, this Court reiterated that the core of the Fourteenth Amendment was the elimination of purposeful and unjustified official distinctions based on race. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Oyama v. California*, 332 U.S. 633, 649 (1948); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

Since the evil to be overcome by this Amendment was a caste system, it was wholly consistent with legislative intent that this Court should expand equal protection coverage beyond color lines, though still within the realm of classifications. It has been held to prohibit unjustified discrimination on the basis of gender, *United States v. Virginia*, 518 U.S. 515, 534 (1996); alienage, *Truax v. Raich*, 239 U.S. 33, 39 (1915); parentage, *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 76 (1968); criminal conviction, *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966); and type of business, *Atchison, Topeka & Santa Fe Railway v. Vosburg*, 238 U.S. 56, 62 (1915). Though the Equal Protection Clause advanced beyond protecting against racial discrimination, its central guiding principle remained the elimination of improper classifications and the protection of vulnerable groups:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged

> class that justifies the disparate treatment? *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring).

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as components of a racial, religious, sexual or national class. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). A violation of the Clause occurs only when the offending action is taken because of its adverse effects upon an identifiable group. *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979).

Judicial Application of the Equal Protection Clause Has Focused on Classifications

Until recently, the view that the Equal Protection Clause was aimed at class-based discrimination prevailed in the appellate circuits. In *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd on other grounds, 510 U.S. 266 (1994), the Seventh Circuit Court of Appeals explained that membership in a class was a prerequisite to a successful equal protection claim. The Sixth Circuit Court of Appeals recently held that plaintiff's membership in a class was essential to a denial of equal protection. *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996). In *Futernick*, a mobile home park owner claimed that selective or vindictive enforcement of local regulations regarding effluent discharge denied him equal protection. The Court concluded that choosing to enforce the law against a particular individual was not a "classification" as that term was commonly understood. 78 F.3d 1051, 1058.

The plaintiff in *Futernick* urged the court to follow the Seventh Circuit decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), which authorized a class-of-one equal protection claim against a public official alleged to have denied a liquor license to a business owner out of sheer vindictiveness. Rejecting the plaintiff's contention that vindictiveness by a public official could trigger an equal protection claim, the Court saw compelling reasons that the motivations of local regulators should not be policed by federal judges. The Court expressed concern about the likely proliferation of class-of-one cases, cautioning that even a moderately artful complaint could characterize almost any regulatory action as both selective and mean-spirited.

Futernick reasoned that the nature of the equal protection right also militated against expanding the federal right beyond classifications. It was clearly not a violation of equal protection, the Court observed, if a local regulator, faced with limited resources, selected people to regulate in a random manner. Nor should the presence of personal animosity convert an otherwise valid enforcement action into a constitutional violation. According to *Futernick*, personal animosity not related to group identity or the exercise of protected rights is entirely random and there is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution's protection begins only when the incidence of the burden of regulation becomes constitutionally suspicious. *Futernick*, 78 F.3d 1051, 1059.

Futernick acknowledged the impropriety of municipal regulation based on vendetta, but reasoned that the states were quite capable of vindicating trammeled rights:

> Those affected by the unfair regulator have recourse to the state political processes that appointed that regulator in the first place. State courts or the state constitution may provide protection. Additionally, in extreme cases, the defendant in a regulatory action may have federal due process claims, reviewed by the Supreme Court of the United States by writ of certiorari. 78 F.3d 1051, 1059.

The Seventh Circuit Court of Appeals which issued the *Esmail* decision in 1995, considered a class-of-one claim three years earlier in *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992). There, the former mayor of a city alleged that due to animosity against him, the city precluded him and any member of his family from obtaining employment or subcontract work at the city's marina facility. The plaintiff claimed that he had been singled out as a "class of one" without rational basis. 965 F.2d at 458. The Seventh Circuit observed that equal protection claims generally require discrimination because of membership in a class, but decided the case on other grounds, leaving open the question of whether a class of one could raise such a claim. Three months later, in *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992), aff'd on other grounds, 510 U.S. 266 (1994), the Seventh Circuit rejected the equal protection claim of a plaintiff who brought a malicious prosecution action, concluding:

> But you must be singled out because of your membership in the class, and not just be the random victim of governmental incompetence. To close the question left open in *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992), we hold that 'the state's act of singling out an individual for differential treatment' does

not itself create the class. That would make every selective prosecution, and indeed every arbitrary act of government, a violation of the Constitution. 975 F.2d at 348 (emphasis in original).

Three years later the Seventh Circuit seemingly closed the door for good on class-of-one actions in *Herro v. City of Milwaukee*, 44 F.3d 550 (7th Cir. 1995). There, plaintiff's applications for a tavern license and occupancy permit were denied by the city's licensing committee allegedly because one member was motivated by "personal whim, prejudice, and capriciousness," and had, in the past, made baseless claims against plaintiff's family members. Rejecting this as an equal protection claim, the Court observed:

A person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual.

* * *

It is true that older cases from this circuit suggest a broader reach to the Equal Protection Clause. *See, e.g., Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989) (holding that a class of only one member can complain of discrimination against his tiny class if he can show that combination of legislative and executive action has singled him out for unique treatment). Yet we think that more recent cases, particularly *Albright*, place additional burdens on plaintiffs to identify the classification behind even a 'class of one.' 44 F.3d at 552.

The Roots of the Class-Of-One Theory

The abrupt retreat from the class requirement reflected in *Esmail*, decided only three months after *Herro*, was attributed to this Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which, the Seventh Circuit reasoned, implied that a federal remedy ought to exist on behalf of one who suffers from the illegitimate objectives of a powerful state or local official. A similar rationale for expanding the scope of the Due Process Clause was rejected in *Parratt v. Taylor*, 451 U.S. 527 (1981), where, addressing the District Court's statement that the prisoner's loss caused by negligent prison officials should not go without redress, this Court stated that precedent and sound constitutional construction, rather than a desire to right every wrong, must govern Fourteenth Amendment jurisprudence.

Moreover, the reference in *City of Cleburne* to "illegitimate objectives" was in the context of state action directed at classes. The example this Court cited to illustrate the principle referred to group discrimination; the "bare . . . desire to harm a politically unpopular group." 473 U.S. 432, 447. The issue in *City of Cleburne* concerned the appropriate standard to be applied for review of equal protection claims brought by the mentally retarded, a group. Nowhere does *City of Cleburne* imply that the Equal Protection Clause would be implicated by vindictive conduct directed at a single person.

It is true, as *Esmail* observed, that by its terms the Equal Protection Clause is not expressly limited to protecting members of identifiable groups. It is submitted by Petitioners, however, that by interpretation reflected in a

century of equal protection jurisprudence, the application of the Clause has been limited to members of identifiable groups; an interpretation entirely consistent with the legislative intent of the Fourteenth Amendment.

The class-of-one cause of action is ultimately traced to *Burt v. City of New York*, 156 F.2d 791 (2nd Cir. 1946), where an architect claimed that city officials deliberately abused their statutory power to deny his applications for architectural projects. He claimed to be the victim of purposeful discrimination because he alone had been selected for these oppressive measures, while the applications of other architects, similarly situated, had been routinely approved. *Burt* drew upon *Snowden v. Hughes*, 321 U.S. 1 (1944), where the petitioner contended that he was denied equal protection of the laws when the respondents, members of the State Primary Canvassing Board, refused to place petitioner's name on an election ballot as required by state law. The *Snowden* majority concluded that no equal protection claim had been stated because the petitioner failed to allege intentional or purposeful discrimination. 321 U.S. 1, 8. In *Burt*, Judge Hand concluded that the "purposeful discrimination" requirement could be satisfied where plaintiff alleged that he had been singled out by the government for abusive treatment.

Although the *Snowden* Court suggested that an allegation of "purposeful discrimination" might sustain an equal protection claim, it never suggested that animosity could suffice. Moreover, "purposeful discrimination," as used in equal protection jurisprudence, means a purpose opposed by the Fourteenth Amendment, i.e., class-based discrimination. *See, e.g. Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (purposeful

discrimination "implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

Though Judge Hand speculated that *Snowden* would have found an equal protection violation had the complaint there "read a little differently," 156 F.2d 791, 792, it is unlikely that the majority would have expressly sanctioned a class-of-one cause of action without a deeper discussion of the historical purpose of the Equal Protection Clause and the ramifications of imposing federal oversight in non-class based local squabbles. It is likely that Justice Frankfurter would have argued for strict restraints on such a cause of action to safeguard both state and federal courts from the imposition of federal oversight of every decision of a municipal official. As was observed by Judge Skelly Wright:

> The key here is that the Equal Protection Clause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case invoking the Equal Protection Clause, if it is to succeed, must allege something more than a tort, personal to the plaintiff. Wright, J., *Judicial Review and the Equal Protection Clause*, 15 Harv. C.R. – C.L. L.Rev. 1, 27 (1980).

Ultimately, *Snowden* stands as precedent for the denial of an equal protection claim brought on behalf of an individual claiming that the state willfully, maliciously and arbitrarily denied him a right granted by statute and accorded to others similarly situated. Factually, *Snowden* and the instant case are quite similar. In both cases the

government allegedly refused to provide that which the claimant reasonably expected and others had received under similar circumstances. Olech characterized Petitioners' conduct as "irrational and wholly arbitrary" motivated by "substantial ill will" (J.A. 6, 10), while Snowden alleged respondent's refusal was "willfully, maliciously and arbitrarily" motivated. 321 U.S. at 14. The *Snowden* Court held that an equal protection claim failed, despite the allegation of the government's malicious and arbitrary action. Here, Respondent's allegation of ill will is just another way of expressing the same malicious and arbitrary action which failed to state a claim in *Snowden*.

Class-Of-One Claimants Are Not Appropriate Beneficiaries of the Equal Protection Clause

Any attempt to invite additional claims under the umbrella of the Equal Protection Clause must be considered in light of the fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states. *McLaughlin v. State of Florida*, 379 U.S. 184, 192 (1964). The underlying objective of the passage of the Civil War Amendments was the elimination of the legacy of subjugation. The predominant belief motivating the committee recommending its adoption was that a former slave could not reasonably expect any, let alone equal, protection from states which had never acknowledged the basic human dignity of the African-American. At the time that

the Equal Protection Clause was enacted, there was significant concern that state governments would be unable or unwilling to safeguard a citizen's civil rights.[2]

The plight of the intended beneficiary of the Equal Protection Clause must be compared with that of the individual asserting class-of-one status. Racial, ethnic and other classifications derive from stereotypes and prejudices that can be widespread among the populace of a geographic area. Class discrimination can pervade state government in all its branches; legislative enactment, executive implementation and judicial interpretation of laws all can be influenced by class animus. Victims of such systematic discrimination are hard pressed to find justice untainted by such prejudices within a particular locality. Thus, the Equal Protection Clause offers a federal forum for the protection of that class from discrimination resulting from perpetuated myths regarding the qualities and characteristics of its members.

Class-of-one animus, however, is no broader in scope than the relationship of the few people directly involved. Class-of-one victims do not suffer from regional discrimination. Even if the entire membership of a municipal governing board harbored ill will toward a permit-seeker, this would have no effect on the state judicial review of the board's decision. The Court need look no further than

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[2] In *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 123, n.11 (1981), Justice Brennan observed that the very reason for the enactment of the Civil Rights Act of 1871 was that there existed at that time "more than a modest distrust" of the ability of state governments to safeguard a citizen's civil rights.

the facts of this case and *Esmail* for illustration of the soundness of this observation. In both cases the claimant had, in a previous dispute with the municipality, prevailed in the state court despite the alleged animosity of village officials. J.A. 5; *Esmail v. Macrane*, 53 F.3d 176, 177 (7th Cir. 1995).

Vindictiveness Does Not Offend Traditional Notions of Equal Protection

The *Esmail* Court found vindictiveness to be the distinctive feature which gave rise to the equal protection claim.[3] 53 F.3d 176, 179. While "purposeful discrimination" has long been a necessary component of an equal protection claim, vindictiveness has never been deemed its equivalent. A legislative act otherwise in line with equal protection principles does not violate the Clause simply because of the improper motives of those who enacted it. *McCray v. United States*, 195 U.S. 27, 56 (1904).

With "vindictiveness" as the essential element of this cause of action, courts will be forced to search the record for proof of improper motivation. In *Palmer v. Thompson*, 403 U.S. 217 (1971), this Court rejected the contention that illicit motivation could lead to a finding of a violation of the Equal Protection Clause, stating, " . . . no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. 217, 224. In *United States v.*

[3] Neither *Esmail* nor *Olech* cited retaliation as a necessary ingredient in the class-of-one cause of action. Retaliation claims do not implicate the Equal Protection Clause. *Watkins v. Bowden*, 105 F.3d 1344, 1354-55 (11th Cir. 1997).

O'Brien, 391 U.S. 367 (1968) the petitioner urged the Court to examine statements by lawmakers to divine the motive of Congress in passing a law prohibiting the knowing destruction of draft cards. This Court instructed that the purpose of Congress was not a basis for declaring legislation unconstitutional because an otherwise constitutional statute will not be struck down on the basis of an alleged illicit legislative motive. "The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Id.* at 383, citing *McCray v. United States*, 195 U.S. 27, 56 (1904).

Similarly, a discretionary act of a public official should not be questioned simply because a dissatisfied resident alleges that vindictiveness contributed to the decision. There is no allegation in Respondent's Complaint that Petitioners' request for a thirty-three-foot easement was unlawful or exceeded their authority, thus, it is solely the improper motive which lies at the heart of Respondent's cause of action. J.A. 3-13. Under *Esmail*, public officials will be fearful of exercising their discretion to deny the request of any resident with whom any member of the municipal administration has had a prior disagreement.

The *O'Brien* rationale that the judiciary's institutional competence and the doctrine of separation of powers preclude exploration of legislative purpose, applies equally to a judicial inquisition into the allegedly vindictive motives of executive officials. Federal courts would be required to search for the motivation behind every municipal action that offends an individual. Compelling

executive officials to refute allegations of vindictive motivation for their exercise of discretionary authority would seem to be a transgression of judicial authority.

Surely, future class-of-one claimants will assert that a legislative body passed an ordinance for the sole purpose of harming them for malicious and vindictive reasons. Undoubtedly, in response to each allegation of evil motive, the legislature will counter with assertion of a coincident proper motive. The judicial inquiry in such cases would focus on the ill feelings of members of the legislative body toward the claimant and whether those feelings were the primary motivation for the legislative act. Such an inquiry would necessitate a full-blown examination of each legislator's relationship or experiences with the plaintiff and, if negative, an exploration of the impact such history had on his or her motives. Such an investigation would be fraught with subjective perceptions and self-serving statements and result in, at best, the fact-finder's best guess as to the legislator's feelings toward the claimant and motives for his actions. This court has recognized the futility of such an effort:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265 (1977).

In *Palmer v. Thompson*, 403 U.S. 217 (1971), the City of Jackson, Mississippi, following a court decree requiring desegregation of its public facilities, closed its swimming pools. This Court accepted the City's assertion that the

pools were closed to avoid violence and economic loss, rather than to refuse integration. This Court warned against grounding a decision on legislative purpose or motivation, and ruled that legitimate purposes asserted were not open to impeachment by evidence that the counsel members were actually motivated by racial considerations.

There will be occasions where a municipal board, comprised of multiple members, votes to deny a citizen's request with the majority of the members voting for legitimate reasons and a single member, or small minority, voting against the citizen for reasons motivated by ill will. Such cases would require depositions of all members so that it could be determined whether the ill will was a proximate cause of the denial. Will the vindictiveness of a single member of a voting board satisfy *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658 (1978) and therefore establish municipal liability under §1983?

The potential chilling effect on the decisions and actions of public officials is discouraging. Any public official who has had any disagreement with a resident would be on notice that the denial of that resident's future request for any permit or service could result in a federal lawsuit. Here, for example, the Complaint alleges that Petitioners' desire was to "improve" the road adjacent to Respondent's home. J.A. 9. Obviously, such an improvement would be for the public good, especially that of the Respondent who would use the road most often; but such thoughts of improvement and the public good must be tempered by caution to avoid litigation.

Compelling Public Policy Disfavors the Class-Of-One Doctrine

Esmail observed that equal protection claims need not be supported by a loss of life, liberty or property, but rather proof of a government attempt to "get" the plaintiff for reasons unrelated to any legitimate state objective. 53 F.3d 176, 180. Thus, *Esmail* created a broad new constitutionally protected right not to be the victim of vindictiveness, with the focus on the conduct of the government official, rather than the loss suffered by the claimant. Every conceivable deprivation brought about by a vindictive public official now rises to a constitutional claim. When this Court rejected a contention that reputation was protected by the Fourteenth Amendment, it stated, in words equally appropriate to the issue now before the Court:

> Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by the respondent. *Paul v. Davis*, 424 U.S. 693, 699 (1976).

Recognition of the class-of-one equal protection claim will invite legions of claims into federal courts. The sweep will be broad; anyone with a history of opposition to or confrontation with a public official will now claim that any adverse act undertaken by that public official

was done with improper motivation and therefore in violation of the Equal Protection Clause. Any person left unsatisfied following prior dealings with a municipality would be elevated to the status of a favored party who will have made out the basis for an equal protection cause of action in the event his future requests are denied. Indeed, the Seventh Circuit in its opinion below was "troubled . . . by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (1998). With motive at the core of such claims, and notice pleading the federal standard, the vast majority of class-of-one equal protection actions will proceed through the discovery phase at least to the summary judgment stage.

If *Esmail* is adopted by this Court, could a criminal prosecution based on vindictive or malicious motives now be attacked by a defense of selective prosecution? *Esmail* expressly stated that a claimant may assert a class-of-one cause of action where he can prove " . . . that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." 53 F.3d 176, 180. At present, to support a defense of selective or discriminatory prosecution, a defendant bears the burden of establishing (1) that others similarly-situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, thus, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in

bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent the exercise of constitutional rights. *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). *Esmail* does not require the claimant to allege that the government retaliated against claimant's exercise of a constitutional right. There seems no logical reason why a criminal defendant who is the victim of a vindictively-motivated prosecution should face a higher standard to establish an equal protection claim than a permit-seeker whose request has been denied for vindictive reasons.

Allowing vindictiveness to establish the cause of action is unfair to failed license seekers who can show improper, but not vindictive, motivation. Would a claimant be denied a class-of-one cause of action if he could demonstrate that the deprivation was attributable to bribery by or favoritism toward a competitor? His oppression is no less harsh merely because the oppressor was not vindictive. Will arbitrary decisions, based on improper motivations other than vindictiveness, survive equal protection challenges? Or will that be the next battle ground for further expansion of the Equal Protection Clause? It is hard to perceive any logical boundary to claims arising out of allegedly improper motives.

The class-of-one also has a potentially devastating effect on public entities in the employment context. The Equal Protection Clause will be asserted by every public employee against whom an adverse employment action was taken by a "vindictive" supervisor. The employee's allegation will be that the supervisor was "out to get him." *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)

(claimant must show that the public official engaged in "a spiteful effort to get him.").

This new cause of action will carry disappointed zoning applicants to federal court. This would clash directly with the principle that it is not the function of federal courts to serve as zoning appeals boards. *Scudder v. Town of Greendale, Ind.*, 704 F.2d 999, 1003 (7th Cir. 1983) (availability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system).

This equal protection theory will provide a federal forum for a host of failed due process claims brought by prisoners. All they must allege is differential treatment and vindictiveness. The case of *Hudson v. Palmer*, 468 U.S. 517 (1984), would now enter the federal court through the Equal Protection, rather than the Due Process, Clause. In *Hudson*, the petitioner alleged that the shakedown of his cell was conducted "solely to harass" him; an allegation of vindictiveness would satisfy the *Esmail* standard.

Expansion of the Equal Protection Clause for vindictive-based claims will also undo this Court's recent attempts to limit access to the federal courts for redress in certain Fourteenth Amendment due process and Fifth Amendment "taking" cases. Currently, a due process claim, based on a random and unauthorized act of a public official, reaches federal court only if the plaintiff first avails himself of all process offered in the state's system. *See, e.g., Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981). The class-of-one cause of action will provide claimants with a federal

alternative to an otherwise premature due process claim; an allegation of vindictiveness is all that is needed.

Substantive due process claims are further restricted by the necessary presence of a liberty or property interest and assertion that defendant's conduct "shocks the conscience." *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-49 (1992); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Adoption of the class-of-one equal protection claim will direct the claimant to a much less demanding route – any alleged damage, whether or not it involves a liberty or property interest, will support an equal protection claim if vindictiveness is alleged, even if the conduct does not shock the conscience. The dissatisfied permit-seeker would opt for the less stringent class-of-one standard rather than the more stringent substantive due process standard.

In the Fifth Amendment "taking" context, an aggrieved property owner has no federal claim until he avails himself of the procedures in place in state court for the recovery of just compensation. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). With the Equal Protection Clause open to class-of-one claims, property owners will enter federal court claiming that their property was singled out for the taking because of vindictiveness on the part of public officials.

The class-of-one cause of action reduces this majestic mechanism of equality to refereeing personal disputes whose worst component is the dislike of one party for the other. There appears no explanation in the legislative

history of the Fourteenth Amendment, nor in equal protection jurisprudence why, in adopting a provision whose motivating cause was the elimination of racial discrimination, those who drafted the Clause intended to place the federal court in a position to oversee and rectify random inequities brought about by vindictive public officials. The Equal Protection Clause would indeed be trivialized and diluted if it were to be invoked to resolve every isolated disagreement. The Constitution and its Amendments were intended to apply to "the large concerns of the governors and the governed . . . not to 'supplant' traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

Adequate Alternative Remedies Exist to Protect Class-Of-One Claimants

Illinois follows the common law that imposes a duty on municipalities operating as utilities to serve their customers without unreasonable discrimination in rates or service. *Austin View Civic Association v. City of Palos Heights*, 85 Ill.App.3d 89, 95, 405 N.E.2d 1256, 1262 (1980); *Inland Real Estate Corp v. Village of Palatine*, 146 Ill.App.3d 92, 98, 496 N.E.2d 998, 1002 (1986). A municipality that operates a utility must refrain from discriminating unreasonably among persons similarly situated. *Schroeder v. City of Grayville*, 166 Ill.App.3d 814, 817, 520 N.E.2d 1032, 1034 (1988). This common law right, unlike the constitutional right, does not require that the consumer be a member of a class. *Greater Peoria Sanitary and Sewage Disposal District v. Kellstedt*, 130 Ill.App.3d 1002, 1005, 474 N.E.2d 1267, 1269 (1985).

In Illinois, discretionary acts of a public official which are arbitrary and capricious are subject to injunctive relief. *Arnold v. Engelbrecht*, 164 Ill.App.3d 704, 518 N.E.2d 237 (1987). Such relief is also available where fraud, corruption or gross injustice is alleged. *Illinois Federation of Teachers v. Board of Trustees, Teachers' Retirement System*, 191 Ill.App.3d 769, 548 N.E.2d 64 (1989). In Illinois, municipal immunity does not extend where injunctive relief is sought (745 ILCS 10/2-101) or where corrupt or malicious motives are alleged. *Madonna v. Giacobbe*, 190 Ill.App.3d 859, 869, 546 N.E.2d 1145, 1152 (1989). Where a public official's non-discretionary authority is at issue, a writ of mandamus is available in state court. *McClaughry v. Village of Antioch*, 296 Ill.App.3d 636, 695 N.E.2d 492 (1998). Decisions of administrative bodies may be overturned by Illinois courts where authority was exercised in an arbitrary or capricious manner or the decision was against the manifest weight of the evidence. *O'Neil v. Ryan*, 301 Ill.App.3d 392, 703 N.E.2d 511 (1998). Legislative acts which are arbitrary and capricious will also be overturned by Illinois courts. *People v. Thompson*, 275 Ill.App.3d 725, 730, 656 N.E.2d 77, 81 (1995). In addition to the state remedies a federal action may be brought where the claimant was arbitrarily deprived of a liberty or property interest in a manner which shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846-48 (1998).

Allowing an equal protection claim before state "protection" has been sought renders the federal courts the substitute tribunal when the state courts would be adequate. In this case, the Respondent purposely avoided an immediately available state remedy. Then, after the water

of which she allegedly had been deprived was provided, launched a federal action, seeking, in addition to compensatory damages, attorneys' fees and punitive damages which could not be obtained in the state court. J.A. 26.

Petitioners submit that Respondent's failure to avail herself of state remedies precludes a denial of equal protection. This Court explained in *Hudson v. Palmer*, 468 U.S. 517 (1984), that to determine whether a due process violation has resulted from the random and unauthorized act of a public official, it was necessary to focus on whether state tort remedies provided a means of redress to satisfy procedural due process requirements. Thus, due process contemplates all procedures available to the victim to undo the deprivation. This Court further clarified in *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), that the constitutional violation under §1983 is not complete when the deprivation occurs; "it is not complete unless and until the State fails to provide due process." This approach was not deemed violative of the directive of *Monroe v. Pape*, 365 U.S. 167 (1961), that state remedies need not be exhausted before filing a §1983 action, because the constitutional violation does not occur until the state remedy is utilized. The state remedy is part of the process that is due. So too, an equal protection violation should not occur until the victim is deprived of the protection offered by state law to redress the grievance. Just as due process includes any available state process, equal protection should include the remedies offered by the state procedures. This is particularly so for class-of-one claimants. Each scenario in which such claims has arisen involved action taken by a public official on a set of facts unique to the claimant. If the act was lawful, its

vindictive motivation should not make it a violation of the Equal Protection Clause; if the act was unlawful, it can be readily redressed through state court procedures.

In his concurring opinion in *Snowden*, Justice Frankfurter expressed his belief that the action taken by a public employee in contradiction with state law could not be deemed state action for equal protection purposes until the state court "confirms such action and thereby makes it the law of the state." 321 U.S. 1, 17 (1944). This observation is rooted in notions of Federalism and comity. In the context of abstention, this Court has recognized the adequacy of the state interest and forum to resolve constitutional disputes. *Juidice v. Vail*, 430 U.S. 327 (1977). *Juidice* found that state court defendants need only have the opportunity to present their federal claims in state court for *Younger* abstention to apply.

Petitioners do not suggest that a plaintiff must exhaust his state remedies before seeking relief for equal protection violations in federal court. Rather, it is submitted that an equal protection violation does not occur until the claimant shows that the state apparatus sustained or otherwise failed to rectify the equal protection denial. In this sense, the equal protection deprivation is incomplete until the state has failed to provide equal protection by reversing the initial act. Underlying *Parratt* and *Hudson* is the recognition that the due process analysis does not end with the act of the official who deprived the plaintiff of his property. This view flows naturally from the fact that the Fourteenth Amendment speaks of "state" action; the state has not acted until the remedial process it provides has been utilized.

It is a long-standing principle that federal courts should not be in the business of granting federal remedies for mere violations of state law. *Snowden v. Hughes*, 321 U.S. 1, 11 (1944). The Fourteenth Amendment is not a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Paul v. Davis*, 424 U.S. 693, 701 (1976). The equal protection concept was not intended to duplicate common law tort liability by conflating all persons not injured into a preferred class. *Booher v. United States Postal Service*, 843 F.2d 943, 944 (6th Cir. 1988). "The concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts." *Indiana Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996).

Any Class-Of-One Equal Protection Cause of Action Should Be Subject to the Rational Basis Standard

If the class-of-one cause of action is sanctioned by this Court, it should carry the presumption of the constitutionality of the government's conduct and should be defeated by proof that the governmental action was supported by any conceivable rational basis. *McGowan v. Maryland*, 366 U.S. 420 (1961); and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (a legislative classification will deny equal protection only if it is not rationally related to a legitimate state interest). The burden should fall upon the claimant to negate every conceivable rational basis which might support the governmental action. *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 364 (1973). Absent such a burden, an otherwise

legitimate government decision could constitute an equal protection violation because the public official harbored ill will for the claimant.

The presumption of constitutionality is reinforced in this case by Respondent's allegation that at least one purpose of the Village's request for the thirty-three-foot easement was a desire to improve the roadway adjacent to which the water main would be placed with pavement, sidewalks and public utilities. J.A. 22. The attorney's letter, cited in the Amended Complaint, explains that the request for the thirty-three-foot easement was consistent with the intent of the grantor when the parcels were originally subdivided and deeded. The original deeds indicated that the parcels, including Respondent's, were subject to the right of public travel over the thirty-three feet bordering Tennessee Avenue. (App. 1-2) At worst, Respondent was a random victim of governmental error and a claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Thus, if a rational basis standard is applied to this case, Respondent's Complaint does not state a cause of action.

The plaintiff should also be held to a pleading standard that would require factual support of allegations that similarly-situated persons were treated differently. Absent such fact pleading, frivolous class-of-one claims will never be dismissed before summary judgment and will therefore necessitate protracted and expensive discovery. Applying such a pleading standard to this case supports the dismissal of the Amended Complaint since it did not include factual support for the allegation that

Respondent was treated differently than others similarly situated.

CONCLUSION

Wherefore, Petitioners pray that this Court will enter its Order reversing the decision issued by the Seventh Circuit Court of Appeals.

Respectfully submitted,

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November 10, 1999

LAW OFFICES OF
GORSKI & GOOD

[Names And Address Omitted In Printing]

November 10, 1995

Mr. John Wimmer
928 Warren Avenue
Downers Grove, Illinois 60515

RE: Tennessee Avenue/Willowbrook

Dear John:

As you know, we have been awaiting the results of title research by Chicago Title as to several parcels of property along Tennessee Avenue, in regard to the request for connection to the Village's water supply. The research has revealed that the two parcels on the west side owned by the Olechs and Phyllis Zimmer are subject to thirty three feet (33') easements along the east (Tennessee Avenue) side in favor of Northern Illinois Gas Co.

In addition, all nine of the parcels were at one time under common ownership. When the property was deeded out to different owners, the original deeds all contained language that they were subject to the right of public travel over the east and/or west thirty three feet (33') of each parcel (along Tennessee Avenue). Clearly this evidences an intent that such portions of the property be used for a public roadway.

The Village's original position of requesting a dedication of thirty three feet (33') is certainly consistent with, and vindicated by, the results of this research. That position was taken in an effort to clear up any confusion that

exists over the legal status of the property. It is unfortunate that your clients have been unwilling to do so, as the search results confirm exactly what the Village was attempting to do.

As we have discussed, in an effort to alleviate your client's water problem, the Village has moved off of its original position and indicated that a fifteen foot (15') easement, along with a temporary construction easement of five feet (5') on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village. It is the Village's position that such an easement is both reasonable and necessary. Of course, it is still necessary to determine where the connections to the main will be located. As I have previously advised you, the Village is working towards obtaining the necessary easements along the east side of the road so that the main can be properly installed.

If you have any additional thoughts, please feel free to call.

Very truly yours,

/s/ Jerry
GERALD M. GORSKI

GMG:nm